In the United States Court of Claims

No. 269–52

(Decided July 12, 1955)

ALFRED C. BERGH, ET AL. v. THE UNITED STATES

Mr. Herbert S. Thatcher for the plaintiffs. *Mr. J. Albert Woll*, *Mr. James A. Glenn*, and *Mr. Joseph E. Finley* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Gilbert E. Andrews*, and *Mr. Thomas Hogan* were on the briefs.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

Alfred C. Bergh, one of the plaintiffs herein, is suing to recover extra pay which he alleges is due him for labor performed on certain legal holidays during the year 1945.[1]

At all times material herein, plaintiff Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia, and, as a per diem civilian employee of the Navy Department. During the year 1945, plaintiff Bergh worked on four holidays for which he was paid his regular per diem wage at straight time. For any work performed on those days in excess of eight hours he received overtime pay.

In furtherance of the prosecution of the war, on October 29, 1942, the Secretary of the Navy issued a directive providing for wartime holiday work by Navy employees. On August 17, 1943, in accordance with a directive of the President issued on May 12, 1943, the Secretary of the Navy issued a further directive which stated in pertinent part, as follows:

[1] The case is presented upon a Stipulation of Facts. It has been agreed by counsel for plaintiffs and defendant that the decision of this court, based upon the Stipulation of Facts, will resolve the questions of law in the case of Bergh and four other plaintiffs similarly situated. The basic questions of law and fact are common to all of the plaintiffs in this action.

> * * * necessity for maintaining maximum output in government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas be considered as regular work days for the duration of the war * * *.

Plaintiff Bergh was subject to these directives. It was only to the extent of these directives that the plaintiff was required to work on four holidays during 1945. Plaintiff Bergh did not request the Department of the Navy to excuse him from work on these holidays.

On August 23, 1945, the normal observance of holidays (by the suspension of activities in the departments) was restored by White House memorandum. Accordingly, plaintiff Bergh did not work on three remaining holidays occurring in 1945. Nevertheless, he was paid his regular per diem wage on those days.

On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for work performed on the four holidays occurring in 1945; namely, New Year's Day (January 1, 1945), Washington's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and the Fourth of July (July 4, 1945). On March 28, 1952, the Comptroller General issued a Settlement Certificate in which he disallowed plaintiff Bergh's claim and certified that no balance was due him from the United States. Thereafter, plaintiff Bergh filed a petition in this court seeking a judgment against the United States for so-called "holiday gratuity pay."

The questions presented are: (1) whether the joint resolution of 1885 [2] established a mandatory benefit for Federal per diem employees and (2) if so, did the joint resolution of 1938 [3] operate to repeal the prior congressional enactment.

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[2] "The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the government, on duty in Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22nd day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day," the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days" (No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. § 86).

[3] "Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as

We believe that the issue in this case was considered and disposed of by the majority opinion of this court in *Kelly* v. *United States*, 119 C. Cls. 197. In that case, one John Stuart Kelly, an hourly rated employee in the Government Printing Office, made the same claim for gratuity pay for holiday work as is being made by plaintiff Bergh, *i. e.*, a claim for an extra day's pay, in addition to his regular pay, for each holiday on which he was required to work and which fell on a regular work day. Kelly, however, predicated his claim not only on existing statutes and administrative practice, as does Bergh, but also, since he was an employee of the Government Printing Office, on certain provisions of the collective bargaining agreement in effect between the Government Printing Office and the Union representing the Government Printing Office employees. There is no such agreement covering Bergh's employment with the Navy Department, so Bergh makes no claim based on a contract theory.

The majority of this court upheld the Kelly claim, both on the theory of statutory right to gratuity pay and on the theory of contract right. The majority opinion specifically held in respect to the claim based on statutory right that the 1938 Resolution did not operate to repeal previously enacted statutory grants of gratuity pay but rather was designed (1) to give the same status, for gratuity pay purposes, to holidays established by Executive Order as to holidays established by statute, and (2) to eliminate a situation under which wage-rate employees, although not called to work, received gratuity pay on holidays which fell on a day, such as a Sunday, when the employee would not have worked in any event. The Government appealed the *Kelly* case to the United States Supreme Court, which Court on January 2, 1952,[4] affirmed, but did so solely on the ground that the collective agreement covering Government Printing Office em-

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New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive Order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"Sec. 2. The Joint resolution of January 6, 1885, U. S. C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict" (c. 818, 52 Stat. 1246, 5 U. S. C. § 86a).

[4] *United States* v. *Kelly*, 342 U. S. 193.

ployees, by its express terms, required the payment of the gratuity pay claimed by Kelly. That Court expressed no opinion on the effect of the 1938 Joint Resolution as repealing prior enactments granting gratuity pay, although the Court did note that "the Resolution was silent on the subject of gratuity pay for holidays on which work was performed."

Defendant in its brief admits that the issue of compensation for loss of income occasioned by the closing of the establishment on a holiday was disposed of by the Joint Resolution of January 6, 1885, *supra*, as amended, but says the second problem, whether an employee required to work on a holiday should be granted additional compensation was not even considered. This brings us to the exact situation in the *Kelly* case, *supra*, wherein the court held that the Act of 1938 did not deny to the plaintiff his right to holiday pay in addition to the pay earned by him when he worked on holidays. To hold otherwise would lead to the conclusion that Congress by the 1938 Resolution intended to put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense. It would also lead to the absurd situation wherein if a per diem employee were required to work on a holiday, he would be paid no more than his fellow worker who was not required to work. Similarly, if a per diem employee were required to work two hours on a statutory holiday, he would be paid for only two hours of labor and would receive less pay than if he were not required to work at all.

As was said in *Kelly* v. *United States*, *supra* (P. 208):[5]

> One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had

[5] It was stipulated in the *Kelly* case that beginning with the Act of 1895 Government Printing Office employees were paid for these holidays whether the holidays fell on what would otherwise have been a work day or not.

noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard, or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it.

* * * * *

This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary.

We can find no inconsistency between the 1885 Resolution and the 1938 Resolution. The 1938 Resolution says nothing on the subject of gratuity pay in situations where work was actually performed on a holiday. The 1885 Resolution has been consistently construed to grant gratuity pay in addition to regular pay for holidays worked and the 1938 Resolution only repealed the 1885 Resolution to the extent that it may be inconsistent.

Plaintiff has been paid for his holiday work. He is now asking only for the gratuity pay granted him under the 1885 Resolution.

All of the circumstances, including the legislative history of the 1938 Resolution, indicate that Congress did not intend to eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day. Furthermore, the 1938 Resolution can be given the construction contended for by plaintiffs herein without doing

violence to its language or creating an inconsistency with the 1885 Act.

The fact that during this period the Secretary of the Navy, in accordance with a directive of the President, issued a directive that holidays, with the exception of Christmas, be considered as regular work days, would have nothing to do with the issue here. If the Government required per diem employees to work on holidays, it should pay for such services.

Plaintiffs are entitled to recover. Judgment will be suspended pending a report from the General Accounting Office as to the exact amount due each plaintiff.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, dissenting:

I dissent for the reasons stated in *Kelly et al.*, v. *United States*, 119 C. Cls. 197; aff'd. 342 U. S. 193.

FINDINGS OF FACT

The court makes findings of fact, based upon the stipulation of the parties, the briefs, and argument of counsel, as follows:

1. At all times material hereto, plaintiff Bergh has been and is now a citizen of the United States of America.

2. During the period from January 1, 1945, to December 1, 1945, Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia and, as a per diem civilian employee of the Navy Department, his rate of pay was fixed by the Secretary of the Navy in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U. S. C. sec. 505.

3. During the period from January 1, 1945, to December 1, 1945, Bergh was required to and did work on each of the following holidays:

January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July

On each of these holidays, Bergh worked 9½ hours and was paid for the work performed on these holidays 8 hours'

straight time and 1½ hours' overtime. On January 1, 1945, Bergh worked the night shift and was paid at the basic rate of pay of $1.57 per hour. On February 22, 1945, May 30, 1945, and July 4, 1945, Bergh worked the day shift and was paid at the basic rate of $1.51 per hour.

4. During the period from January 1, 1945, to December 1, 1945, Bergh was excused from working but was nevertheless paid 8 hours' straight time for the following holidays:

September 3, 1945	Labor Day
November 12, 1945	Armistice Day (November 11, 1945, falling on a Sunday)
November 22, 1945	Thanksgiving Day

For each of these holidays on which Bergh performed no work, Bergh, who was at those times on the day shift, was paid 8 hours' straight time at the rate of pay of $1.51 per hour.

5. Bergh resigned from his employment in the Norfolk Naval Shipyard on August 13, 1946, at which time he entered the military service of the United States. He was honorably discharged from the military service on February 5, 1948, and was re-employed in the Norfolk Naval Shipyard on February 16, 1948.

6. On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for the work performed on January 1, 1945, February 22, 1945, May 30, 1945, and July 4, 1945. On March 28, 1952, the Comptroller General issued a settlement certificate in which he disallowed Bergh's claim and certified that no balance was due him from the United States. A true copy of such settlement certificate is attached to the petition herein as Exhibit No. 1.

7. Prior to the enactment of the Joint Resolution of June 29, 1938 (52 Stat. 1246), the statutes relating to holiday pay for per diem employees generally were as follows:

> That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the

fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days (23 Stat. 516, Jan. 6, 1885).

That all per diem employees of the Government on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as "Memorial" or "Declaration Day" and the fourth of July of each year, as holiday, and shall receive the same pay as on other days (24 Stat. 644, Feb. 23, 1887).

That the first Monday of September of each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays (28 Stat. 96, June 28, 1894).

That the 11th day of November in each year, a day to be dedicated to the cause of world peace and to be hereafter celebrated and known as Armistice Day, is hereby made a legal public holiday to all intents and purposes and in the same manner as the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, the first Monday of September, and Christmas Day are now made by law public holidays (52 Stat. 351, May 13, 1938).

8. The Joint Resolution of January 6, 1885, was initially construed by the Comptroller of the Treasury so as to deny an extra day's pay, at straight rates, called "gratuity" pay, to per diem employees who worked on a holiday. In a decision dated March 11, 1898 (4 Comp. Treas. 499), the following question from Major Dan C. Kingman, Corps of Engineers, was answered in the negative:

> (4) On all large works, it is frequently necessary to keep a certain number of per diem men at work on legal holidays to attend to the pumps, look after the steam machinery, take care of public animals, or for some unforeseen emergency work. In such cases would it be lawful and proper to allow these men an extra day's pay in order to put them on an equality with their fellows who do not work on the holiday and yet are paid full wages for it?

However, in a decision dated July 23, 1906, to the Secretary of the Navy, the Assistant Comptroller of the Treasury

later construed the above set forth Joint Resolution of January 6, 1885 (23 Stat. 516), to permit the payment of the regular per diem wage for work performed by first-class electrical machinist at the Naval Proving Grounds on a holiday, in addition to gratuity pay required by the Joint Resolution to be paid. In referring to said Joint Resolution of January 6, 1885 (23 Stat. 516), and the above set forth Joint Resolution of February 23, 1887 (24 Stat. 644), the opinion said:

> These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay given is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. *The pay has no relation to work.* If the public interests require that these employees shall work on the stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their *labor*, but have received merely the gratuity which they were entitled to without working. They are, therefore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day (13 Comp Treas. 40).

On February 26, 1918, H. F. Wortham, Captain, Quartermaster Reserve Corps, requested an opinion of the Comptroller of the Treasury as to whether per diem employees who worked on holidays should be paid gratuity pay plus time and one-half for the hours actually worked, as provided by an authorization of the Quartermaster General made with approval of the Secretary of War. In his reply of March 16, 1918 (24 Comp. Treas. 529) the Comptroller said:

> It has been held by this office that where, by reason of public necessity, per diem employees are required to perform services for the Government on any of the holidays specified in the Acts of Congress dated January 6, 1885 (23 Stat. 516); February 23, 1887 (24 Stat. 644); and June 28, 1894 (28 Stat. 96), they would be entitled, unless otherwise expressly provided, to double pay for such days, i. e., gratuity pay granted by Con-

gress and regular pay for services actually performed on said days. See 8 Comp. Dec. 322; 21 Comp. Dec. 571; 22 Comp. Dec. 405, and 24 Comp. Dec. 218.

On May 5, 1934, the Secretary of the Navy propounded a number of inquiries of the Comptroller General, some of which pertained to gratuity pay, and in this answer of May 19, 1934 (13 Comp. Gen. 370), the Comptroller General stated the opinion that gratuity pay in addition to the regular rate of pay should be given for work performed on any of the holidays mentioned in the Acts of January 6, 1885 (23 Stat. 516), February 23, 1887 (24 Stat. 644), and June 28, 1894 (28 Stat. 96).

9. Navy Regulations, 1896, Article 1574 (d) pertaining to pay of per diem workers provided:

> For work performed on Sundays or on legal holidays, the ordinary rate of pay, plus 50% additional shall be allowed.

Navy Regulations, 1900, Article 1574 (d) and Navy Regulations, 1905, Article 1600 (c) contain the same provisions quoted above.

Navy Yard Order No. 853, dated August 16, 1910, stated, in part:

> * * * per diem employees paid from lump sum appropriation at Navy Yards, who are regularly required to work on Sundays and holidays, are entitled for work performed on national holidays to their regular rate of pay and in addition thereto gratuity pay.
>
> Laborers and mechanics who by reason of any emergency are required to work on national holidays are entitled to their regular rate of pay plus 50% additional, and in addition thereto to gratuity pay.

Navy Regulations and Naval Instructions, 1913, 382 (5) provided:

> For work performed on Sundays or on legal holidays by reason of an emergency, the ordinary rate of pay, with 50% additional, shall be allowed, and in addition thereto gratuity pay for the legal holidays.

Schedule of Wages for 1924, page 20, provided:

> For work on legal holidays not exceeding 8 hours performed under proper authority, the schedule rate of pay,

plus 50% additional, shall be allowed, and, in addition thereto, gratuity pay for the legal holiday.

For work in excess of 8 hours on Sundays or legal holidays performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay shall be allowed.

Schedule of Wages for 1925, page 20; Schedule of Wages for 1926, page 42; Schedule of Wages for 1927, page 43; Schedule of Wages for 1927, as amended, effective July 1, 1927, page 44; Schedule of Wages for 1928, page 41; Schedule of Wages for 1929, page 47; and Schedule of Wages revised to July 23, 1931, page 59, all contain the same provisions as that of the 1924 schedule quoted above.

Schedule of Wages revised to March 1, 1936, pages 55–56 provided:

For work on legal holidays within the employee's regular tour of duty, the schedule rate of pay shall be allowed, and in addition thereto gratuity pay for the legal holiday.

Gratuity pay shall be allowed for legal holidays not within the employee's regular tour of duty and upon which no work is performed.

* * *

For work on legal holidays, not exceeding 8 hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay, plus 50% additional, shall be allowed, and in addition thereto, gratuity pay for the legal holiday.

For work in excess of 8 hours on Sundays or legal holidays, when such days are not a part of the employee's regular tour of duty, performed by reason of an extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay, shall be allowed.

10. Public Resolution No. 127 (52 Stat. 1246), enacted on June 29, 1938, provided as follows:

That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piecework basis are relieved or prevented from working *solely* because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Tranksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments

and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed *to the extent of such inconsistency or conflict.*

11. The Secretary of the Navy was informed by the Comptroller General, in decision of July 6, 1938, A–94536, 18 Comp. Gen. 10, that gratuity pay for holidays was no longer a vested right of per diem employees but that such employees were then entitled to pay for holidays only under and subject to the conditions of the Joint Resolution. The Comptroller General further held in decision of August 19, 1938, A–97193, 18 Comp. Gen. 188, as follows:

> Hence regular per diem, per hour and piecework employees are entitled to their regular pay for holidays on which no work is performed only if and when they are "relieved or prevented from working solely because of the occurrence of" the holiday. If they are relieved or prevented from working on the holiday for any reason other than the occurrence of a holiday such as when the holiday occurs on a non-workday or within a period of furlough or leave of absence, no pay for the holiday as such is authorized. If such employees are required to work on a holiday occurring within their regular tour of duty, only one day's pay is authorized—payment of gratuity holiday pay in addition being no longer authorized. If the holiday occurs on a day outside the regular tour of duty of 40 hours per week and work is required on the holiday, the employee is not entitled to 2 days' pay, one for working and one for the holiday, but may be entitled to overtime pay for the day under administrative regulations at a rate not less than one and one-half times their regular pay.

12. Navy Department Circular Letter of August 17, 1938, based on the 1938 resolution and the Comptroller General's opinion A–94536, deleted the provision of the Schedule of Wages revised to March 1, 1936, quoted in finding 9 hereof and substituted therefor:

> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are

closed by Executive Order, within the employee's regular tour of duty, the schedule rate of pay shall be allowed.

Whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday by Federal statute or Executive Order, or any day on which the departments and establishments of the Government are closed by Executive Order, he shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, not exceeding eight hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay plus 50% additional shall be allowed.

For work in excess of eight hours on Sundays or on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, when such days are not a part of the employee's regular tour of duty, performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay shall be allowed.

Schedule of Wages, effective November 18, 1940, page 63; Schedule of Wages, revised to November 30, 1943, page 29; and Schedule of Wages, revised to October 16, 1944, pages 21–22, restated the provisions of the Circular Letter of August 17, 1938 quoted above, with some minor variations in wording.

Navy Civilian Personnel Instructions, NCPI 250.7–12 and 250.7–13 of April 13, 1945, continued the substantive provisions of the Circular Letter of August 17, 1938.

NCPI 250 Amendment 2 of September 20, 1945 substituted for provisions originated in the Circular Letter of August 17, 1938 quoted above, the following:

a. Per diem employees shall be allowed compensation at the rate of true time and one-half for work on a Sunday or holiday falling outside the regular tour of duty, provided they have been in a pay status during the regular 40-hour tour of duty.

b. For work on a Sunday or holiday falling within the regular 40-hour tour of duty, per diem employees are

allowed the same rate of pay as for any other day within the regular tour of duty.

13. In recognition of the construction of the Comptroller General of the Joint Resolution of June 29, 1938, there were introduced into Congress several bills to restore holiday gratuity pay rights similar or in addition to those conferred by prior statutes upon per diem employees. None of such bills was enacted into law. The first such bill was House Joint Resolution 303, 76th Cong., 1st Sess., which was introduced by Mr. Darden and referred to the Committee on Civil Service May 24, 1939 (84 Cong. Rec. 6111), and read as follows:

> That Public Resolution numbered 127, Seventy-fifth Congress approved June 29, 1938 entitled "Joint Resolution providing compensation for certain employees" be amended by striking out all after the resolving clause and substituting in lieu thereof the following:
> "That hereafter whenever employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are granted a holiday by Executive Order, or whenever the departments and establishments of the Government are closed by Executive Order in observance of a public event, they shall receive the same pay for such days as on other days on which an ordinary day's work is performed and all Acts or parts of Acts repealed or modified by the Act of June 29, 1938 (Public Resolution No. 127, 75th Cong.) are hereby restored to full force and effect."

On May 30, 1939, Robert Ramspeck, Chairman, Committee on Civil Service, House of Representatives, requested a report of the Civil Service Commission regarding the proposed legislation. On October 31, 1939, the president of the Civil Service Commission, Harry B. Mitchell, replied, stating that:

> It will be seen, therefore, that the Joint Resolution of June 29, 1938, thus interpreted [by the Comptroller General] instead of conferring the additional benefits of pay for days declared holidays by Executive Order, may operate to deprive a per diem employee of the gratuity pay for *statutory holidays*, a benefit which for more than fifty years has been regarded as in the nature of a vested right. This interpretation of the statute grants no additional pay to a per diem employee who is required to work on a statutory holiday occurring within

his regul[ar tour of duty, while a per diem employee with
exactly t[he same tour of duty who is not required to
work re[ceives exactly the same pay for the holiday.
Further, [the receipt of pay for statutory holidays upon
which p[er diem employees are not required to work is
depende[nt upon circumstances which may be purely
fortuito[us, such as the occurrence of a holiday upon an
administ[rative non-work day, or within a period of
furlough [or leave without pay. In other words, if two
per diem[employees performing exactly the same work
are assig[ned to different tours of duty, one including a
statutory[holiday, and the other excluding it, the em-
ployee a[ssigned to the former tour will receive pay for
the holid[ay, whereas the employee assigned to the latter
tour wil[l not, although neither employee is required to
work on[that day. Since H. J. Res. 303 will adjust
any ineq[ualities as between per diem employees them-
selves, th[e Commission believes that favorable consider-
ation sho[uld be given to the bill.

The B[ureau of the Budget has advised this office that
the enac[tment of H. J. Res. 303 in its present form
would n[ot be in accord with the program of the Presi-
dent. T[he Bureau states, however, that there would
be no o[bjection to the enactment of legislation which
would p[ermit the payment of compensation to a regular
per die[m employee when absent from duty for any
cause on[a holiday occurring within the tour of duty.

In the 77t[h Cong., 1st Sess., there was introduced H. R.
1386, a bill [to grant all employees of the United States
Government [equal rights and privileges with respect to all
established [national holidays. H. R. 1386, introduced by
Mr. Darden [and referred to the Committee on Public Build-
ings and Gr[ounds on January 6, 1941 (87 Cong. Rec. 47),
reads as foll[ows:

That [all employees of the United States Government
whose t[our of duty requires them to work on any na-
tional h[oliday for any reason whatsoever be not deprived
of the b[enefits of any such holiday as to gratuity pay as
may be [established by Congress.

SEC. [2. Where and whenever a holiday falls during
any em[ployees' tour of duty, such as employees of Gov-
ernmen[t power plants, Fire Department employees, tele-
phone o[perators, guards and other maintenance workers
who m[ay be required to work on holidays, that such
employe[es be either granted extra compensation over and
above t[he gratuity pay allowed by congresssional action
for all [national holidays or that the employees be granted

time out for such work on any holiday, and during the week in which a holiday falls.

SEC. 3. Compensation for holiday work shall be at one and one-half times the regular rate of pay and shall be in addition to the gratuity pay allowed for holiday. Where time out is granted for holiday work in lieu of compensation, such time shall likewise be granted on the same basis as the overtime rate of pay.

SEC. 4. After the passage of this Act, it shall be unlawful to work any employee of the United States Government in excess of thirty-two hours a week in which a national holiday falls, and for which said employee shall receive pay for forty hours' work; except that the stipulations of section 3 of this Act shall be complied with.

On January 14, 1941, Robert Ramspeck, Chairman, Committee on Civil Service, transmitted a copy of H. R. 1386 to the Civil Service Commission and requested a report of the Commission's views regarding the proposed legislation. On July 21, 1941, the Acting President, Lucille Foster McMillin, Civil Service Commission, replied, recommending certain changes and favorable consideration of the bill and stating further that the Bureau of the Budget had advised that the enactment of H. R. 1386, either in its present form, or in the amended form suggested by the Civil Service Commission, would not be in accord with the program of the President. but that there would be no objection to the enactment of legislation which would permit the payment of compensation to a regular per diem employee when absent from duty for any cause on a holiday occurring within his tour of duty.

There was introduced in the 77th Congress, 1st Session, S. 1930 (introduced September 24, 1941 by Senator Byrd and referred to the Senate Committee on Naval Affairs, 87 Cong. Rec. 7526) and H. R. 6222 (introduced December 15, 1941, by Mr. O'Toole and referred to the House Committee on Civil Service, 87 Cong. Rec. 9750). S. 1930 and H. R. 6222 both read as follows:

That the first section of the joint resolution entitled "Joint Resolution providing compensation for certain employees," approved June 29, 1938, is amended by inserting before the period at the end thereof a colon and the following:

"*Provided*, That whenever any employee of the Federal Government who is employed at any Navy yard or naval station is required to work on any such holiday

or day on which the departments and establishments of the Government are closed by Executive order, he shall be allowed compensatory time off on one other workday within the week following such holiday or, in lieu thereof, be paid one additional day's pay at his regular rate."

In the 79th Congress, 2d Sess., S. 1679, "A bill to authorize additional compensation for work performed on a legal holiday by employees of the Government Printing Office," was passed by the Senate on March 5, 1946 (92 Cong. Rec. 1919) and provided as follows:

That employees of the Government Printing Office who are required to work on days designated by Federal statute or Executive order as holidays are entitled, for the time worked, to their regular rate of compensation in addition to the regular pay for the holiday.

S. 1679 was not passed by the House.

14. In the 77th Congress, 1st Session, there was introduced H. R. 1642, a proposed amendment to Public Resolution No. 127, to include per diem employees of the District of Columbia Government and to leave the substantive provisions of the Resolution unchanged. H. R. 1642 passed the House on June 2, 1941 (87 Cong. Rec. 4624) after the construction placed upon Public Resolution No. 127 by the Comptroller General had become well known and after other bills such as H. J. Res. 303, 76th Congress had been introduced to change the substantive effect of the Public Resolution as construed by the Comptroller General. H. R. 1642 was not passed by the Senate.

15. The Secretary of the Navy issued the following directives providing for wartime holiday work by Navy employees and disciplinary action against employees failing to report for work on holidays:

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BECAUSE OF THE NECESSITY FOR EXPEDITING WORK DUE TO WAR EMERGENCY 11 NOVEMBER ARMISTICE DAY X WILL BE A WORK DAY FOR ALL EMPLOYEES OF THE NAVY DEPARTMENT X MARINE CORPS AND COAST GUARD AND THEIR FIELD SERVICES PARAGRAPH EMPLOYEES WILL RECEIVE THEIR REGULAR COMPENSATION FOR WORK PERFORMED ON ARMISTICE DAY X EXCEPT

THAT EXSTING OVERTIME PROVISIONS APPLY X ER ANNUM EMPLOYEES WHO ARE DIRECTED TO REPORT FOR WORK ON THE HOLIDAY AND DO NOT REPORT FOR WORK ON THAT IAY SHALL NOT BE PAID FOR THE HOLIDAY X PER DIEM EMPLOYEES WHO ARE DIRETED TO WORK ON THE HOLIDAY AND DO NOT REPORT FOR WORK ON THAT DAY SHAL BE MARKED OUT AND APPROPRIATE DSCIPLINARY COGNIZANCE TAKEN OF FAILURE TO REPORT FOR DUTY PARAGRAPH I ACCORDANCE DECISION COMP. GEN. 2 APIL NO CHARGE SHALL BE MADE AGAINST HE ANNUAL OR SICK LEAVE ACCOUNTS O PER ANNUM AND PER DIEM EMPLOYEES FOR ABSENCE ON THE HOLIDAY WHETHE WITH OR WITHOUT AUTHORITY.

August 17 143 ALNAVSTA 172309

IN ACCOIDANCE WITH A DIRECTIVE OF THE PREIDENT 12 MAY THAT NECESSITY FOR MAITAINING MAXIMUM OUTPUT IN GOVERNMENT ACTIVITIES THROUGHOUT THE WAI PERIOD REQUIRES THAT DAYS NORMALLY OBSERVED BY THE DEPARTMENTS ND AGENCIES AS HOLIDAYS SHOULD WITH EXCEPTION OF CHRISTMAS BE ONSIDERED AS REGULAR WORK DAYS FO DURATION OF WAR X LABOR'S HOLIDAYS SEPTEMBER AND ALL SUCCEEDING HOLDAYS X WITH EXCEPTION OF CHRISTMS WILL BE WORK DAYS FOR ALL EMPLOYES OF THE NAVY DEPARTMENT X HEADQURTERS US MARINE CORPS AND HEADQURTERS US COAST GUARD AND THEIR FELD SERVICES X INSTRUCTIONS REGARDNG ARMISTICE DAY IN ALNAVSTA 291330 OCOBER 1942 APPLY.

16. On May 1, 1943, the following White House Memorandum was issd:

To the Heis of Executive Departments and Agencies
Subject: Oservance of holidays during the war period

The neceity for maintaining maximum output in Governmer activities throughout the war period requires thatlays normally observed by the departments and agenci as holidays should, with the exception of

Christmas, be considered as regular work days for the duration of the war.

By direction of the President:

(S) Wm. H. McReynolds,
Administrative Assistant to the President.

This Presidential directive was reaffirmed on December 17, 1943, by Mr. W. H. McReynolds, Administrative Assistant to the President, in the following statement addressed to the heads of the Federal Departments and Agencies:

On May 13, 1943, by direction of the President, I issued the following statement concerning the observation of holidays:

"The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas, be considered as regular work days for the duration of the war."

This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realizaion of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.

With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

Accordingly, per annum and per diem employees of the United States were required to work on all succeeding holidays except Christmas until August 23, 1945, when the eight paid holidays were restored by White House Memorandum.

17. The Federal Employees Pay Act of 1945 (59 Stat. 295), effective July 1, 1945, authorized holiday premium pay at the rate of time and one-half "in lieu of their regular pay" when graded employees were required to work on a holiday. This law thus created an inequity between the two groups of employees—graded and ungraded. With a view to correcting this inequity, the Secretary of the Navy and the Secretary of War in a joint letter to the Comptroller General asked whether the heads of the two departments by administrative order could authorize holiday premium pay for ungraded employees required to work on holidays. The Comptroller General ruled in the affirmative on February 7, 1946 (25 Comp. Gen. 584). By official order dated February 19, 1946 (Alnavsta No. 11), the Secretary of the Navy directed that all ungraded employees required to work on a holiday falling within the regular workweek be paid for such work at the rate of time and one-half in lieu of their regular rate. Bergh was an ungraded employee within the meaning of the Federal Employees Pay Act of 1945.

18. On September 9, 1942, the President, in Executive Order No. 9240, 7 F. R. 7159, limited the holiday pay of persons employed in war work, effective October 1, 1942, as follows:

> Whereas many labor organizations have already adopted the patriotic policy of waiving double time wage compensation or other premium pay for work on Saturday, Sunday and holidays, as such, for the duration of the war; and
>
> Whereas it is desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers and employees who are conforming to such wage policies that this principle be universally adopted.
>
> Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander in Chief of the Army and Navy, it is hereby ordered:
>
> I. That the following principles and regulations shall apply for the duration of the war to the payment of premium and overtime wage compensation on all work relating to the prosecution of the war:
>
> A. No premium wage or extra compensation shall be paid to any employee in the United States, its territories or possessions, for work on Saturday or Sunday except

where such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek and as hereinafter provided.

(1) Where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled workweek a premium wage of double time compensation shall be paid for work on the seventh day.

(2) Where required by the provisions of law or employment contracts, not more than time and one-half wage compensation shall be paid for work in excess of eight hours in any day or forty hours in any workweek or for work performed on the sixth day worked in any regularly scheduled workweek.

B. No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only:

New Year's Day	Thanksgiving Day
Fourth of July	Christmas Day
Labor Day	

and either Memorial Day or one other such holiday of greater local importance.

II. All Federal departments and agencies shall conform the provisions in all existing and future contracts negotiated, executed, or supervised by them to the policies of this order. All such departments and agencies shall immediately open negotiations to alter provisions in existing contracts to conform them to the requirements of this order.

III. Nothing in this order shall be construed as requiring a modification of the principle that every employee should have at least one day of rest in every seven days. The continuous operation of plants and machines in prosecuting the war does not require that employees should work seven consecutive days.

IV. Nothing herein shall be construed as superseding or in conflict with the provisions of the statutes prescribing the compensation, hours of work and other conditions of employment of employees of the United States.

V. All Federal departments and agencies affected by this order shall refer to the Secretary of Labor for determination questions of interpretation and application arising hereunder.

* * * * *

Interpretative Bulletin No. 1 of Executive Order 9240, U. S. Department of Labor, Office of the Secretary, dated February 17, 1943, contained the following provisions:

> The Secretary of Labor, pursuant to Section V, is authorized and directed to interpret the provisions of Executive Order 9240. This bulletin is intended to set forth the Secretary's interpretations. The Order was designed (1) to facilitate 'round-the-clock war production, (2) to discourage absenteeism found to have resulted from the practice of paying premium rates for particular days as such, and (3) to assure, in the interest of efficiency and health, observance of the principle that workers should have at least one day of rest in each week. The interpretations embodied in this bulletin have been made after a number of months of experience under the Order and are believed to be in accord with its purpose.
>
> * * * * *
>
> ## II. COVERAGE
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> * * * * *
>
> * * * Agricultural workers and *employees of Federal or State Government, and political subdivisions thereof, are not subject to the Order.*
>
> * * * * *
>
> ## VIII. HOLIDAYS
>
> 15. Paragraph I B of the Order has two requirements: (1) It requires time and one-half for work on the 6 holidays enumerated in the Order, and (2) it forbids payment of any premium wage or extra compensation for work on any other holidays as such. A choice is afforded between Memorial Day and any other holiday of greater local importance. Failure to select a substitute holiday leaves Memorial Day as the sixth holiday under the Order. The holiday chosen as a substitute for Memorial Day need not be the same holiday each year but only 6 holidays may be paid for at premium rates in the 12-month period beginning October first.
>
> 16. The Order requires that time and one-half compensation be paid for work on designated holidays but forbids payment in excess of time and one-half. Thus, if the wages of an employee include compensation for a holiday although not worked, the additional amount which must be paid under the Order for work performed on that holiday is limited to such amount as

brings the total compensation for the day to time and one-half.

17. Compensation for work performed on a holiday should be computed at one and one-half times the straight-time rate paid for work on that day or one and one-half times the average straight-time hourly rate for the workweek, whichever is the customary method of computing overtime compensation. The employer's records should indicate which method is adopted.

18. For purposes of computing the seventh day of work in a workweek under the Order, the designated holidays must be included in the count whether or not work is performed on such days. An idle holiday should be included in computing the sixth day worked in the workweek unless the employment contract specifies otherwise.

19. Insofar as the Order requires payment of time and one-half for work on the designated holidays, it means payment of time and one-half for the hours worked on the calendar holiday, namely, hours worked between midnight at the beginning of the holiday and midnight at the close of the holiday.

20. However, in order to give all employees equal benefit of the holiday, it is permissible to compensate employees at time and one-half for all hours worked on a shift, some part of which cuts across the calendar holiday. It is not permissible to pay the time and one-half holiday rate for more than one shift in a situation in which the employee works two shifts, both of which cut across the calendar holiday. However, employees must be paid time and one-half for at least all the hours worked on the calendar holiday.

21. If one of the designated holidays falls on Sunday, either Sunday or Monday may be observed as the holiday, but not both.

22. There is no provision in the Order relating to compensation on holidays not worked.

* * * * *

Because its Zone Pay Standards were substantially identical to the provisions of Executive Order 9240 the shipbuilding and ship-repair industry was exempted from the terms of Executive Order 9240 (by order of Secretary of Labor, dated February 25, 1943). By these Zone Standards, employees of the shipbuilding and ship-repair industry were paid time and one-half for work performed on specified holidays during the period from July 19 1952, to October 6, 1945.

19. The wage and working conditions of Bergh and a first-class electric welder employed by the largest privately owned shipyard in the Norfolk, Va., area, the Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia, on January 1, 1945, were as follows:

Bergh (Navy):	Newport News Shipbuilding & Welder Dry Dock Co.:
1. Rate of pay:	
(a) Night shift, $1.57 per hour.	Unknown.
(b) Day shift, $1.51 per hour.	
(c) Holiday pay, same as above.	1½ regular rate on 6 specified holidays per year if worked.
2. Vacation: 26 days per year.	One week per year for employees with 2 years continuous service. Two weeks per year for employees with 10 years continuous service.
3. Sick leave: 15 days per year.	None.
4. Paid holidays: 8 days per year.	None.
5. Retirement: Civil Service.	Social Security.
6. Bonus plan: None.	None.
7. Hospitalization (in addition to on-the-job injury): None.	Employee-company participation.
8. Insurance (in addition to on-the-job injury): None.	Employee-company participation.

The holidays worked and pay received therefor by production employees of the Newport News Shipbuilding and Dry Dock Company during 1945 were as follows:

January 1, 1945.	Holiday worked.	Pay and ½ received.
February 22, 1945.	Holiday worked.	Straight pay received

(George Washington's Birthday not a holiday specified in collective bargaining agreement or Zone Standards)

May 30, 1945.	Holiday worked.	Pay and ½ received.
July 4, 1945.	Holiday worked.	Pay and ½ received.

September 3, 1945.	Holiday not worked.	No pay received.
November 12, 1945.	Holiday worked.	Straight pay received.

(Armistice Day not a holiday specified in collective bargaining agreement)

November 22, 1945.	Holiday not worked.	No pay received.
December 25, 1945.	Holiday not worked.	No pay received.

20. No other action has been taken on this claim in Congress or by any of the Departments; no person other than Bergh is the owner thereof or interested therein; no assignment or transfer of this claim or any part thereof, or interest therein has been made.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover.

Entry of judgment is suspended pending the filing of a report by the General Accounting Office showing the amount due each plaintiff in accordance with this decision.

Supreme Court of the United States

No. —

October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

vs.

ALFRED C. BERGH, ET AL.

Order extending time to file petition for writ of certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 9th, 1955.

[S] EARL WARREN,
Chief Justice of the United States.

Dated this 7th day of October 1955.

(28)

U. S. GOVERNMENT PRINTING OFFICE: 1955